

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND CIVIL APPEAL NO. 108 OF 2004.

1. Shri Pedro Antonio Fernandes,
of major age, retired, landlord,
residing at House No. 151,
Pedda Grande, Benaullim, Salcete,
Goa. And his wife:

 2. Smt. Adelina Roberta Pereira Fernandes,
presently deceased
through her legal representatives:
 - (a) Shri Tristan Fernandes,
of major age, residing at
House No. 151, Pedda Grande,
Benaullim, Salcete, Goa.

 - (b) Smt. Tracy Fernandes Pereira,
of major age, married,
and her husband:

 - © Shri Rosario Pereira,
of major age,
both residing at House No.44/B,
Ratwaddo, Navelim, Salcete, Goa.

 - (d) Shri Terence Fernandes,
of major age, bachelor,
residing at House No. 151,
Pedda Grande, Benaullim,
Salcete, Goa.
- Appellants.

Versus

1. Smt. Rosada Fernandes,
widow of Caetano Fernandes,
(Presently deceased after
passing of the decree)
through her legal representatives
and son:

1. Shri James Fernandes

alias James Francisco Fidelis Fernandes,
son of Caetano Fernandes, of major age,
residing at House No. 151,
Pedda Grande, Benaulim,
Salcete, Goa.

2. Shri Daniel Alexander Rosario Fernandes
son of late Caetano Fernandes,
of major age, business,
and his wife.
3. Smt. Brigit Debitte Fernandes,
of major age, housewife,
both residing at Row 44,
Westland, Dublin 2, Ireland.
4. Shri Hillary John Fernandes,
son of late Caetano Fernandes,
of major age, employed,
and his wife:
5. Smt. Elsie Fernandes,
major in age, housewife,
both residing at 10,
Wandering Trail, Scarborough,
Ontario, Mix-1K5, Canada.
6. Shri Leo Fernandes,
son of late Caetano Fernandes,
of major age, employed,
residing at 10, Wandering Trail,
Scarborough, Ontario,
Mix-1K5, Canada.
7. Shri Nereus Roque Aquino Fernandes,
son of late Caetano Fernandes,
of major age, employed, and his wife:
8. Smt. Joan Pereira e Fernandes,
of major age, housewife,
both residents of TAL STR 32A, 4000,
Dusseldorf, Germany.

.... Respondents.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Appellants.

Shri Sudin M.S. Usgaonkar, Advocate for the Respondents No.2 to 8.

CORAM: A. P. LAVANDE, J.

DATE: 13th APRIL, 2006.

O R D E R:

By this appeal the appellants take exception to Judgment and Decree dated 24th June, 2004 passed by the 1st Additional District Judge, South Goa, Margao in Regular Civil Appeal No. 80/2000 by which the appellate Court allowed the appeal filed by the respondents against the Judgment and Decree dated 29th April, 2000 passed by the Civil Judge, J.D., Margao in Regular Civil Suit No. 224/88/E by which the suit instituted by the respondents against the appellants was dismissed.

2. The appellants are the defendants in the above suit and the respondents are the legal representatives of the original plaintiff. The plaintiff filed the above suit for possession and mesne profits in respect of the suit property known as “ Peda Grande “ alias “Peda” bearing survey Nos.95/8 and 95/6. The plaintiff also prayed for possession of the house existing in the suit property (hereinafter referred as the 'suit premises') and also for delivery of the keys of the store room. The suit was contested by the defendants/appellants and the trial Court by

Judgment and decree dated 29.4.2000 dismissed the suit. Appeal preferred by the respondents has been allowed by the Addl. District Judge, Margao. The appellate Court held that the plaintiff has title to the suit property in which the suit premises are existing and held that the defendants have no right to the suit property as well as to the suit premises.

3. Mr. Lotlikar, learned Senior Counsel appearing on behalf of the appellants submitted that the findings recorded by the appellate Court are contrary to the evidence on record. He further submitted that on the pleadings of the plaintiff herself it is clear that the defendants are the mundcars in respect of the suit premises and therefore the appellate Court exercised jurisdiction illegally in decreeing the suit for eviction. According to the learned counsel, the appellants/defendants being mundcars in respect of the suit premises, the decree of the appellate Court granting eviction is without jurisdiction and therefore the same deserves to be quashed and set aside. He further submitted that although the plea of mundkarship was not specifically raised in the written statement filed by the defendants, plea of mundkarship was raised before the appellate Court, but the appellate Court wrongly rejected the plea holding the same to be vague. According to the learned counsel, the issue of mundkarship does arise in the present proceedings and therefore

the appeal deserves to be admitted on the substantial questions of law formulated by the appellants.

4. Per Contra, Mr. Usgaonkar, learned counsel appearing for the respondents, submitted that the appellants/defendants, at no point of time in their pleadings, took the plea of mundkarship in respect of the suit premises but, on the contrary, having regard to the pleadings of the defendants in the written statement filed by them, it is evident that the defendants claimed to be co-owners of the suit premises. He invited my attention to the pleadings in the written statement and more particularly to paragraph 18 of the written statement wherein the defendants specifically took the plea that they were co-owners of the suit premises. According to Mr. Usgaonkar, the defendants having not taken the plea of mundkarship, are not entitled to raise the plea for the first time either before the lower appellate Court or before this Court in Second Appeal. According to the learned Counsel, in order to claim mundkarship, a party has to take a specific plea and no issue of mundkarship arises on a vague plea. In support of his submissions, he relied upon the Judgment of this Court in *Mitra of Archdiocese of Goa and Daman v. Mr. K. Vijayadharan* reported in 1999 (2) Gooa L.T. 97 and in *Zuari Real Estate Co. Pvt. Ltd. v. Shri Thomas Souza* reported in 2002 (2) Goa L. T. 78.

5. I have considered the submissions made by the learned Counsel for the respondents. From the perusal of the pleadings filed by the parties, it is evident that nowhere in the written statement filed by the appellants/defendants they have taken the plea of mundkarship. I find considerable merit in the submissions of Mr. Usgaonkar that the plea of mundkarship has to be specifically taken because if such a plea is raised, the issue has obviously to be decided by the Mamlatdar, since the Civil Court has no jurisdiction to decide the issue under the Mundkar Act. In my view, the defendants having not taken the plea specifically in the written statement, but on the contrary having taken the plea of co-ownership of the suit premises, they cannot be permitted to raise it by way of argument either before the first appellate Court or before this Court in Second Appeal. If it was the case of the defendants that on the pleadings of the plaintiff herself, an issue of mundkarship arose, the defendants ought to have insisted upon framing of such an issue by way of proper pleadings. The defendants having not done so, in my opinion, they are not entitled to challenge the decree of eviction passed by the lower appellate Court. Since the issue of mundkarship was not raised by way of proper pleadings, in my opinion, there is no merit in the submission of Mr. Lotlikar that the issue of mundkarship arises on the basis of the pleadings of the plaintiff herself.

6. In view of the above, I do not find any merit in this Second Appeal. Consequently the same is summarily rejected.

A. P. LAVANDE, J.

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